

Someone who has received a prohibited telephone solicitation under Bus & P C §17592(a) may bring an action for an injunction or an order to prevent further violations. Bus & P C §17593(b). Once an injunction or order has been issued, if the person receives further solicitations in violation of the injunction or order within 30 days, the person may file a subsequent small claims court action for enforcement and for civil penalties up to \$1000. Bus & P C §17593(b).

An affirmative defense to such an action is that the violation was accidental and in contravention of the defendant's own policies. Bus & P C §17593(d).

In addition to the California prohibition against unwanted telemarketing, federal law, known as the Do-Not-Call Implementation Act (15 USC §§6101–6108), also prohibits these solicitations.

XII. HOME BUILDING AND IMPROVING

A. Contractor's License Law (Bus & P C §§7000–7173)

1. [§5.129] Statutory Coverage

The purpose of the Contractor's License Law is to protect the public from dishonest, incompetent, and irresponsible contractors. *Lewis & Queen v N. M. Ball Sons* (1957) 48 C2d 141, 149, 308 P2d 713, 718. "Contractor" is very broadly defined to include anyone who does any work on a building project of any kind (Bus & P C §§7026–7027; 59 Ops Cal Atty Gen 424 (1976)), unless statutorily exempted (Bus & P C §§7040–7040.5). Among others, the term does not include licensed architects or registered engineers (Bus & P C §7051), those who furnish unfabricated materials or supplies (Bus & P C §7052), certain owner-builders as long as the structure they build is not intended or offered for sale (Bus & P C §7044), or an employee whose sole compensation is wages (Bus & P C §7053). The contractor's license law does not apply to jobs with a contract price less than \$500 unless the person advertises as a contractor. Bus & P C §7048(a).

2. [§5.130] Statutory Requirements

Under Bus & P C §7164, every contract and any changes in a contract between an owner and contractor for the construction of a single-family dwelling to be retained by the owner for a minimum of one year must be in writing, signed by both parties, and must contain the following:

- Identifying data, including the contractor's license number.
- Approximate beginning and completion dates.

- Description of the location where the work is to be done.

The following statutory requirements also apply:

- Anyone who acts in the capacity of “contractor” must be licensed by the state. Bus & P C §7028. This includes anyone who advertises for work as a contractor. Bus & P C §§7027–7027.5. Even joint ventures must be licensed. Bus & P C §7029.
- The license number must be included in all contracts, subcontracts, bids, and advertising. Bus & P C §7030.5.
- All prime contracts, except for home improvement contracts under Bus & P C §7151.2 and service and repair contracts under Bus & P C §7159.10, must contain a statement that contractors are required to be licensed and are regulated by the Contractors’ State License Board. Bus & P C §7030(a). See also Bus & P C §7030(b) for the required form of the notice. However, a contractor’s failure to comply with Bus & P C §7030 (or Bus & P C §7018.5) does not deprive the contractor of the right to bring an action on the contract. *Gonzales v Concord Gardens Mobile Home Park, Ltd.* (1979) 90 CA3d 871, 153 CR 559.
- Licensed contractors, before entering into a home improvement contract under Bus & P C §7159, must give the buyer a copy of a written contract, signed and dated by both the contractor and the buyer, and must incorporate a change-order form. Bus & P C § 7159(a), (e).
- Contractors must file a contractor’s bond for \$7500 (\$10,000 for swimming pool contractors). Bus & P C §7071.6. See also Bus & P C §7071.9 (bond required for qualifying individual). Parties damaged by the contractor’s acts may claim against the bond in a civil action. Bus & P C §§7071.10–7071.11. See also CCP §§995.850, 996.410–996.495.
- Contractors whose licenses have been suspended or revoked at least twice within an eight-year period (or whose license was suspended or revoked for disciplinary reasons) must prominently disclose this suspension in any contract to perform work on residential property or in the bid or estimate given before entering into the contract. Bus & P C §7030.1.
- Contracts for sale of home improvement goods or services that are offered at door-to-door sales and that contain or are secured by liens on real property must contain an 18-point boldface warning as specified in Bus & P C §7159.1.

When a claim is made against a contractor’s bond in small claims court,

then under CCP §116.340(g), if an action is filed against both the principal and surety, but the principal cannot be served, the action must be transferred to a court of appropriate jurisdiction. Because the amount of the claim and not the amount of the bond determines jurisdiction (CCP §996.430(b)), for any claim under the jurisdictional limit, the small claims court has jurisdiction even if the principal cannot be served. But see §3.30 regarding transfers of action. Claims on bonds may be transferred like other causes of action. CCP §996.430(c).

3. [§5.131] Statutory Prohibitions

No contract for home improvement goods or services that is for \$5000 or less may be secured by an interest in real property, except by a mechanics' lien that arises by operation of law. Bus & P C §7159.2(a). Nor may a contractor require a clause, or enter into a contract containing a clause, that violates the public policy against indemnity provisions (see CC §2782). Bus & P C §7034(a).

A contractor may not require any subcontractor, supplier, or employee to waive any lien rights (see CC §3262 and Bus & P C §7034(b)) and must pay any subcontractor within 15 days of receipt of each progress payment if the contract is with a public utility (see CC §3262.5).

Numerous other acts are prohibited by the contractor's license law and violators are subject to disciplinary proceedings or suspension or revocation of their licenses, *e.g.*,

- Willful and deliberate violations of state or local law relating to building permits. There is a rebuttable presumption that construction performed without a permit is a willful and deliberate violation (Bus & P C §7113).
- Breach of contract (Bus & P C §7113).
- Aiding an unlicensed person to evade the law (Bus & P C §7114).
- Failure to comply with the provisions of the contractor's license law, department rules and regulations, or Pub Cont C §7016 (Bus & P C §7115).
- Any willful or fraudulent act which substantially injures another (Bus & P C §7116).
- Willful failure to complete a construction project with reasonable diligence (Bus & P C §7119).

4. [§5.132] Requirements for Maintaining Action

Under Bus & P C §7031, no contractor may bring an action to recover

compensation for work requiring a license without alleging that he or she was at all times duly licensed except as provided in Bus & P C §7031(e). Bus & P C §7031. Business and Professions Code §7031 applies despite possible injustice to the unlicensed contractor. *Pacific Custom Pools, Inc. v Turner Constr. Co.* (2000) 79 CA4th 1254, 1261, 94 CR2d 756. If there is any dispute about whether the contractor was licensed, the contractor must prove licensure by presenting his or her license to the court. See Bus & P C §7031(d). The party challenging proper licensure is not required to produce a certificate; the burden of proof to establish licensure is on the licensee. Bus & P C §7031(d). The burden is on the licensee even when the other party has pleaded improper licensure as an affirmative defense. *Buzgheia v Leasco Sierra Grove* (1997) 60 CA4th 374, 393, 70 CR2d 427.

Although the judicial doctrine of substantial compliance does not apply to the rule of Bus & P C §7031, under Bus & P C §7031(e), a contractor may bring an action for compensation if the court determines that the individual was a duly licensed contractor before the performance for which compensation is sought, acted reasonably to maintain the license, did not know or reasonably should not have known that the license had not been maintained when the work began, and acted promptly to reinstate the license on learning that it was invalid. Bus & P C §7031(e). The exceptions of §7031(e) to the inapplicability of the doctrine of substantial compliance apply to all contracts entered into after January 1, 1992, with certain exceptions, such as when legal action or arbitration had commenced before January 1, 1995, or was previously dismissed and refiled after January 1, 1995. Bus & P C §7031(f). A contractor may obtain a retroactive renewal of a license only if he or she shows that the failure to renew was beyond the control of the licensee. Bus & P C §7141.5.

An unlicensed contractor may avoid the consequences of the prohibition against the substantial compliance doctrine under Bus & P C §7031(e) if the contractor proves that it had been licensed before performing work, acted reasonably in trying to maintain a license, and either did not know or reasonably could not have known that it was unlicensed. *Pacific Custom Pools, Inc. v Turner Constr. Co.*, *supra*, 79 CA4th at 1262. A contractor does not lose the right to be compensated merely because he or she performs some additional work after discovering the loss of the license. *Slatkin v White* (2002) 102 CA4th 963, 971, 126 CR2d 54. A claim of substantial compliance is not supportable, however, when the contractor is aware that its license was suspended for failure to file a judgment bond, its application for license renewal was untimely, and the filing fee check was dishonored. *Pacific Custom Pools, Inc. v Turner Constr. Co.*, *supra*, 79 CA4th at 1264.

Except as noted above, an unlicensed contractor may not recover either

in law or in equity for work performed even if he or she “substantially” complied with the licensing law. An unlicensed entity entering into a contract “to improve the property” acts in the capacity of a contractor and is therefore barred by Bus & P C §7031(a) from bringing claims based on the contract, even if that entity only performed administrative or oversight functions and subcontracted with licensed contractors to provide the actual labor, equipment, and materials. *Vallejo Dev. Co. v Beck Dev. Co.* (1994) 24 CA4th 929, 940–942, 29 CR2d 669.

An unlicensed contractor may not bring an action for fraud allegedly committed to induce the performance of work for which a license is required (see Bus & P C §7031). *Hydrotech Sys., Ltd. v Oasis Waterpark* (1991) 52 C3d 988, 277 CR 517. In addition, an unlicensed contractor is barred under Bus & P C §7031 from bringing a contract action against a landowner even when the contract provides for payment from third parties rather than from the landowner. These payments are considered “compensation” within the meaning of the statute. *K & K Servs., Inc. v City of Irwindale* (1996) 47 CA4th 818, 821, 54 CR2d 836. An unlicensed contractor may bring an action for racial discrimination under 42 USC §1981, although he or she may not bring an action against the same defendant for failure to make payments under the contract. *Holland v Morse Diesel Int’l Inc.* (2001) 86 CA4th 1443, 1451–1453, 104 CR2d 239.

The person who uses the services of an unlicensed contractor may bring an action to recover the compensation paid to that contractor. Bus & P C §7031(b).

B. Home Improvement Contracts (Bus & P C §§7150–7163)

1. [§5.133] Statutory Coverage

“Home improvement” is defined to include repairing, remodeling, altering, converting, modernizing, or adding to residential property, including the construction or improvement of swimming pools for single-family residences (see Bus & P C §7166), spas, and awnings, and the installation of “home improvement goods,” such as carpeting or air conditioning. Bus & P C §7151.

A “home improvement contract” is any agreement, oral or written, between an owner or tenant and a contractor or salesperson involving home improvements. Bus & P C §7151.2.

2. [§5.134] Statutory Requirements

Contractors engaged in the home improvement business, including

swimming pool construction, must be licensed, and salespeople must be registered. Bus & P C §§7150.1, 7153. “Swimming pool” includes any permanently installed spa or hot tub. Bus & P C §7151. The contract requirements are as follows (Bus & P C §7159):

- The contract and any changes must be in writing and signed by the parties, and a copy must be given to the owner at the time it is signed and before any work is started. Bus & P C §7159(a), (d).
- The writing must be legible, and any printed form must be readable. Bus & P C §7159(b), (c).
- When the buyer receives a copy, his or her rights to cancel under the Home Solicitation Act is triggered, provided the contract complies with the Act. Bus & P C §7159(d).
- A change-order form for changes or extra work must be incorporated into the contract and must be part of the contract if it is in writing and signed by the parties. Bus & P C §7159(e).
- Change orders required by the building department at the job site are deemed to be incorporated into the contract without both parties’ signatures. Bus & P C §7159(f).
- Contract requirements of Bus & PC §§7159.3–7159.6 apply.

A security interest taken by a contractor to secure payment for the performance of a home improvement contract that occurred on or after January 1, 1995, is unenforceable if the person who solicited the contract was not a registered salesperson or was not exempt from the registration requirement under Bus & P C §7152 at the time the homeowner signed the contract. Bus & P C §7153(b).

In *Asdourian v Araj* (1985) 38 C3d 276, 211 CR 703, the court held that an oral home improvement contract for over \$500, in violation of (former) Bus & P C §7159, is not necessarily void and unenforceable when denial of enforcement would impose an unduly harsh penalty on the contractor and leave the property owner unjustly enriched. The court allowed the plaintiff-contractor in this case to recover on such a contract partly because the defendant was a real estate investor, not an unsophisticated homeowner or tenant. See also *Davenport & Co. Inc. v Spieker* (1988) 197 CA3d 566, 242 CR 911 (contractor allowed to recover for work performed under homeowner’s oral changes to written contract; homeowner was general partner in real estate investment and development firm).

Any representation by the contractor with respect to a trademark or brand

name, quality, or size of any goods or materials, in reference to certain specified goods or materials (*e.g.*, a sink, stove, or refrigerator), must be set forth in writing in the contract or specifications and must include a description of the goods or materials, including any brand name, model number, or similar designation. Bus & P C §7162. The contract must be in writing and signed by the parties, and a copy must be given to the owner before any work is done. Bus & P C §7159(a), (d).

3. [§5.135] Statutory Prohibitions; Suit for Penalty

False or misleading advertising, false completion certificates, misrepresentation in processing the contract, false promises, and fraud are prohibited as misdemeanors. Bus & P C §§7158(a), 7160–7161.

A person who is induced to contract for a work of improvement, including but not limited to a home improvement, in reliance on false or fraudulent representations or false statements knowingly made, may sue and recover from the contractor or solicitor (a) a penalty of \$500 plus (b) reasonable attorneys' fees and (c) any damages caused by the statements or representations. Bus & P C §7160.

A homeowner who has been defrauded under Bus & P C §7158(a) (accepting a completion certificate when the work has not been completed) in connection with repairs to damage caused by a natural disaster is entitled to full restitution, as well as a fine determined by the defendant's ability to pay. Bus & P C §7158(b).

Any contract for the construction of a swimming pool that does not comply with the requirements of Bus & P C §7159 is void and unenforceable by the contractor. Bus & P C §7167. In an action arising out of a contract for swimming pool construction, the court must award reasonable attorneys' fees to the prevailing party. Bus & P C §7168.

Under Bus & P C §7163, unless certain requirements are satisfied, a home improvement contract is unenforceable against the buyer when the obtaining of third party financing is a condition precedent to the contract, the contractor provides financing, or the contractor assists the buyer to obtain financing. If the contract is unenforceable under the section, the contractor must return any money or consideration to the buyer. The rights and remedies provided the buyer under this section are nonexclusive and cumulative, and any waiver of these provisions is unenforceable.

When a swimming pool contract is to be financed by a third party lender and specified conditions are met, under Bus & P C §7165, certain other requirements may be substituted for some of the requirements specified in Bus & P C §7163.